Re Ho Weng Keong, ex p Marketlink (M) Sdn Bhd

HIGH COURT (KUANTAN) — BANKRUPTCY NO 29–40–1991
LAMIN J
2 JUNE 1992

Bankruptcy *— Petition — Affidavit verifying petition sworn before presentation of petition — Whether petition valid — Whether verifying affidavit must be affirmed after presentation of petition — Whether second affidavit verifying petition could correct first affidavit — Bankruptcy Act 1967 s 6 — Bankruptcy Rules 1969 r 106*

Bankruptcy *— Petition — Second affidavit verifying petition sworn more than six months after act of bankruptcy — Whether second affidavit was valid — Whether application for extension of time to file second affidavit was necessary — Bankruptcy Act 1967 s 5 — Bankruptcy Rules 1969 r 108*

In these bankruptcy proceedings, the creditor's petition was dated 3 July 1991 and the affidavit verifying the petition was also affirmed on the same day ('the first affidavit'). Both the creditor's petition and the affidavit were filed on 4 July 1991. In December 1991, the judgment debtor applied to strike out the creditor's petition on the ground that the first affidavit was sworn before the presentation of the creditor's petition. On 26 February 1992, the judgment creditor affirmed a second affidavit to verify the same creditor's petition ('the second affidavit'). The judgment debtor argued that filing the second affidavit was an admission that the first affidavit was bad. The judgment debtor also contended that the second affidavit was bad because it was not affirmed within six months of the alleged act of bankruptcy. The judgment creditor had also applied for an extension of time to file the second affidavit.

Held, allowing the creditor's petition:

(1) Nowhere in the Bankruptcy Act 1967 ('the Act') or the Bankruptcy Rules 1969 ('the Rules') is it stated that the affidavit verifying the creditor's petition must be affirmed after the filing or presentation of the creditor's petition. If the Rules demand that the affidavit shall be affirmed and filed only after the presentation of the creditor's petition, then it shall be so stated.

(2) In this case, all the statement in the creditor's petition were already before the deponent of the first affidavit at the time he affirmed the first affidavit. There was therefore no reason for refusing to accept the first affidavit.

(3) There is no statutory provision imposing a limitation of six months from the act of bankruptcy within which an affidavit verifying the creditor's petition must be affirmed.

(4) Accordingly, the first affidavit was good in law and if the first affidavit failed, the second affidavit served to correct the error made by the first affidavit.

(5) The Act and the Rules are silent on the question of applying for an extension of time to file the second affidavit. Such an application was unnecessary as time was not of the essence for the filing of a verifying affidavit.

[Bahasa Malaysia summary

Di dalam prosiding kebankrapan ini, petisyen pemiutang bertarikh 3 Julai 1991 dan afidavit yang menentusahkan petisyen juga telah disahkan pada hari yang sama ('afidavit pertama'). Kedua-dua petisyen dan afidavit pemiutang telah difailkan pada 4 Julai 1991.

Pada December 1991, penghutang penghakiman telah memohon untuk membatalkan petisyen pemiutang atas alasan bahawa afidavit pertama telah disumpah sebelum petisyen pemiutang dikemukakan.

Pada 26 Februari 1992, pemiutang penghakiman telah mengesahkan afidavit yang kedua untuk menentusahkan petisyen pemiutang yang sama ('afidavit kedua'). Penghutang penghakiman berhujah bahawa apabila afidavit kedua difailkan, itu merupakan suatu pengakuan bahawa afidavit pertama tidak sah. Penghutang penghakiman juga berhujah bahawa afidavit kedua tidak sah kerana ia tidak disahkan dalam tempoh enam bulan dari perbuatan kebankrapan yang dituduh itu. Pemiutang penghakiman juga telah memohon perlanjutan masa untuk memfailkan afidavit kedua.

Diputuskan, membenarkan petisyen pemiutang:

(1) Akta Kebankrapan 1967 ('Akta itu') dan Kaedah Kebankrapan 1969 ('Kaedah itu') tidak menyatakan bahawa afidavit yang menentusahkan petisyen pemiutang mesti disahkan selepas petisyen pemiutang difailkan atau dikemukakan. Jika Kaedah itu menuntut supaya afidavit itu disahkan dan difailkan hanya selepas petisyen pemiutang dikemukakan, ia akan dinyatakan.

(2) Di dalam kes ini, semua pernyataan di dalam petisyen pemiutang telah berada di hadapan deponen afidavit pertama pada masa beliau mengesahkan afidavit pertama. Oleh itu, tidak ada sebab mengapa afidavit pertama tidak boleh diterima.

(3) Tidak terdapat peruntukan statutori yang mengenakan had tempoh enam bulan dari perbuatan kebankrapan itu dalam mana suatu afidavit yang mengesahkan petisyen pemiutang mesti disahkan.

(4) Oleh itu, afidavit pertama adalah sah dari segi undang-undang dan jika afidavit pertama gagal, afidavit kedua akan membetulkan kesalahan dalam afidavit pertama.

(5) Akta itu dan Kaedah itu tidak menyatakan apa-apa tentang soalan permohonan untuk perlanjutan masa untuk memfailkan afidavit kedua. Permohonan sedemikian adalah tidak perlu kerana masa tidak menjadi asas apabila suatu afidavit penentusahan difailkan.]

Cases referred to

1 *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32 (not folld)

2 *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 (refd) A

Legislation referred to
Bankruptcy Act 1967 ss 5(1)(c), 6(1), (7)
Bankruptcy Rules 1969 rr 106, 108, 115
Companies (Winding-up) Rules 1972 r 26 B

Noraskin bte Jamaludin (*Balendran Chong Haranay & Bodi*) for the judgment debtor.

A Ramanathan (*Loke Chew & Zainal*) for the judgment creditor. C

Lamin J: In these bankruptcy proceedings, the creditor's petition was dated 3 July 1991 and the affidavit verifying all the statements contained in this said petition was affirmed on the same day, ie 3 July 1991. Both the petition and the affidavit were presented to this court on the following day, ie 4 July 1991. On 12 December 1991, the judgment debtor filed a notice of motion (encl 11A) praying for the creditor's petition to be struck out for D non-compliance with s 6 of the Bankruptcy Act 1967 ('the Act') and r 106 of the Bankruptcy Rules 1969 ('the Rules'). On 26 February 1992, the judgment creditor filed a second affidavit to verify the same creditor's petition presented on 4 July 1991. The motion (encl 11A) was heard on 6 March 1992 and I dismissed it with costs. Following the dismissal of the E motion, I made a receiving order as well as an adjudication order against the judgment debtor.

Briefly, the arguments of the learned counsel for the judgment debtor in support of her motion were that the filing of the second affidavit on 26 February 1992 (affirmed on 25 February 1992) had the effect of nullifying the first affidavit and also on the authority of *Sobri bin Arshad v* F *Associated Tractors Sdn Bhd*,[1] the first affidavit was bad as it was sworn before the presentation of the creditor's petition. The second affidavit was also bad as it was not affirmed within six months from the alleged act of bankruptcy.

Section 6(1) of the Act states: 'A creditor's petition shall be verified by G affidavit of the creditor or ...'. It is the statements contained in the petition that are required to be verified as to their truth. As I understand it, a deponent can only depose as to the truth of facts that are existing or have existed. Now the facts or statements in the present petition were dated 3 July 1991 and the affidavit verifying those facts was also dated the same day, and its para 2 directs our attention to 'all the statements in this H petition' (segala pernyataan dalam petisyen ini). It cannot be denied that 'all those statements' were already before the deponent at the time when he affirmed the affidavit. Nowhere either in the Act or the Rules is it stated that the affidavit must be affirmed *after* the *filing* or *presentation* of a petition. Of course it goes without saying that any cause or matter that seeks the I decision of or determination by the court must first be filed in the registry of the respective court. That is the only way for a case to be placed before a judge. In the case of a winding-up of a company, r 26 of the Companies (Winding-up) Rules 1972 expressly provides that the affidavit in support

'shall be sworn after and filed within four days *after* the petition *is presented* ...' (see the case of *Chin Yoon Timber Co v Overseas Lumber Bhd*[2]). There must be a good reason why such a condition is imposed in proceedings against a company. If in every case, the Bankruptcy Rules of 1969 demand that the affidavit shall be affirmed and filed only *after the presentation* of the creditor's petition, then it shall be so stated. On the facts of the case before me, what we are saying to the deponent of the first affidavit is that his affidavit is of no effect and cannot serve to verify the statements in the creditor's petition notwithstanding the fact that those statements had been placed before him and were within his knowledge before he swore the said affidavit, except for the fact that both the petition and the affidavit were filed one day later. If those statements had been placed before him and were within his knowledge before the deponent swore the affidavit surely he must have sworn the truth and therefore there was absolutely no reason for refusing to accept his affidavit. The creditor's petition was filed and presented on 4 July 1991 though it was prepared the previous day. The affidavit was filed together with the creditor's petition on 4 July 1991 though it was sworn the previous day having properly verified as to the contents of the petition. Of course an affidavit cannot support an 'unborn petition' because there is nothing for the court to decide as the petition is not before the court. Now both the petition and the affidavit are together before the court and in my view, there is no flaw in the affidavit. In the circumstances, I am not prepared to take the life of this newly born babe, the petition, by striking it out on the ground that its apparent life support system, the affidavit, has been alleged to be technically faulty.

Now coming to the second affidavit that was filed on 26 February 1992. Can it be said, as submitted by counsel for the judgment debtor, that filing the second affidavit shows that the first affidavit is bad and cannot be relied upon and in fact is an admission that it is bad. I am indeed tempted to agree. If a private citizen is at first sure that he has sworn the truth and becomes unsure of the validity of his affidavit upon being made aware of the intention to challenge it, he then comes to court and files a second affidavit with the hope that if he is thrown out on his first affidavit, he may not be thrown out the second time. He has not however provided an explanation when filing the second affidavit. When *Sobri*'s case[1] was thrown at his face, must an unfavourable inference be immediately drawn against him because by filing the second affidavit it was an admission by him that the first affidavit was bad even though this court is not even bound by *Sobri*.[1] I think he is still entitled to be heard. I have said all I need to say about the first affidavit. With regards to the second affidavit, it was submitted before me that it was equally bad but for a different reason, in that it was affirmed more than six months from the alleged act of bankruptcy. There is no statutory provision imposing a limitation of six months from the act of bankruptcy within which an affidavit verifying the petition must be affirmed. Section 5(1) of the Act merely stipulates that a creditor 'shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is grounded has occured within six months before the presentation of the petition.' If the act of bankruptcy occurs more than six months before the presentation of the petition, the

petition shall not be allowed to come to life because the creditor has lost his right to present it. But for so long as the entitlement is available to him, meaning within the period of six months, the creditor may present his petition at any time within the period and once presented, it remains with the court. The court will not adjudicate until an affidavit verifying the statements contained in the petition is filed. As I have said, once presented it remains with the court. It cannot even be withdrawn without the leave of the court (s 6(7) of the Act). Theoretically it can remain in the court's file (presented) until kingdom come. But, as required by r 108, *after the presentation* of the petition and *before sealing the copies* for service, the registrar shall investigate the statements contained in it and where some of the statements in the petition cannot be verified by affidavit, witnesses may be summoned to prove them. Even at this stage, it does not appear that the registrar has the power to determine the quality or validity or otherwise of any verifying affidavit before him. But if he finds that some of the statements cannot be verified by affidavit, he may require the creditor to have witnesses summoned. So the presentation of evidence is not limited by way of affidavit only and when witnesses have to be summoned, the process of verifying the statements in the petition may even take more than six months. It is also the duty of the registrar under r 115 to appoint the time and place at which the petition will be heard and notice to that effect will be written or endorsed on the petition and the sealed copies. At the time when the registrar has to fix the time and place of the hearing of the petition, he is not duty bound to satisfy himself whether all the statements in the petition have or can be verified. Even if the date of hearing has been endorsed on the petition and its sealed copies, the hearing will not take place until it is served by whatever mode of service as allowed under the Rules. Even at the stage when the registrar investigates the statements in the petition under r 108, in my view, it is not required for the verifying affidavit to be placed before him though ideally it should. He merely makes his own judgment on the statements whether they *can* or *cannot* be verified by affidavit. Rule 108 does not use the words '*have* or *have not* been verified by affidavit'.

Having considered the requirements under the Act and the Rules, the first affidavit as I have found is good in law and if that fails, then the second affidavit must serve to correct the error made by the first affidavit. I would also like to mention in passing however in regard to the application for an extension of time to file the second affidavit. Be it noted that both the Act and the Rules are silent on this question and I certainly think that such an application is unnecessary. This also goes to show that time is not of the essence for the filing of a verifying affidavit.

Order accordingly.

Reported by Zarinah Marican